

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Empire Mutual Insurance Company :  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Corporation Tax :  
under Article 33 of the Tax Law for the Year 1976. :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of May, 1983, he served the within notice of Decision by certified mail upon Empire Mutual Insurance Company, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Empire Mutual Insurance Company  
1965 Broadway  
New York, NY 10023

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
6th day of May, 1983.

David Parchuck

Annice P. Hayes

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Empire Mutual Insurance Company :  
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AFFIDAVIT OF MAILING

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State of New York  
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of May, 1983, he served the within notice of Decision by certified mail upon Don DiDio the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Don DiDio  
Ernst & Whinney  
153 E. 53rd Street  
New York, NY 10022

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
6th day of May, 1983.

David Parchuck

Conrad A. Hagelund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

May 6, 1983

Empire Mutual Insurance Company  
1965 Broadway  
New York, NY 10023

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1503 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Don DiDio  
Ernst & Whinney  
153 E. 53rd Street  
New York, NY 10022  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
EMPIRE MUTUAL INSURANCE COMPANY  
for Redetermination of a Deficiency or for  
Refund of Corporation Franchise Tax Under  
Article 33 of the Tax Law for the Year 1976.

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DECISION

Petitioner, Empire Mutual Insurance Company, 1965 Broadway, New York, New York 10023, filed a petition for redetermination of a deficiency, or for refund of corporation franchise tax under Article 33 of the Tax Law for the year 1976 (File No. 32492).

A formal hearing was held before Irving Atkins, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 17, 1981 at 1:25 P.M. Petitioner appeared by Ernst & Whinney (Stephen C. Eldridge, Partner, and Don DiDio, Tax Manager). The Audit Division appeared by Ralph J. Vecchio, Esq. (Barry M. Bresler, Esq., of counsel).

#### ISSUE

Whether penalties and interest should be imposed against petitioner.

#### FINDINGS OF FACT

1. On August 31, 1977, the Supreme Court of the State of New York, County of New York, Hon. Sidney H. Asch, Justice, adjudged Empire Mutual Insurance Company ("Empire") insolvent and placed it in rehabilitation under the control and direction of the Superintendent of Insurance (herein the "Rehabilitator"). This action was taken upon the petition, dated August 30, 1977, of John F. Lennon, the then Acting Superintendent of Insurance, pursuant to Article XVI of the Insurance Law because "Empire had defaulted in making certain contributions

to surplus". The Superintendent of Insurance was directed to take possession of the property of Empire and conduct its business as Rehabilitator of Empire. It was further ordered that payment of any claims against Empire be deferred until further order of the court. The effective date of the court's order of rehabilitation was September 7, 1977.

2. One week after the Rehabilitator had taken possession and control, Empire's 1976 franchise tax return (CT-33) was filed. At line 18 of that return, Empire reported a balance of tax due of \$145,378.00.

3. The Audit Division's reconciliation worksheet (CT-412) corrected this balance due by reporting \$145,390.00 as the balance of tax owed.

4. By an order dated October 20, 1980, Justice Asch terminated the aforesaid rehabilitation proceedings and Empire was directed to thereafter continue the enterprise in its own right. Included among the directives in this termination order of October 20, 1980 was an order that Empire "...pay as soon as practicable all outstanding obligations incurred by Empire..., prior to or during the rehabilitation proceedings;...".

5. A Notice and Demand for Payment of Corporation Tax Due (CT-335) was issued by the Audit Division to Empire on November 28, 1980 for payment of the corrected balance of tax due (\$145,390.00) which should have been paid more than three years earlier, plus \$45,754.23 in interest and \$56,702.10 in penalties for a total amount due of \$247,846.33.

6. Empire's petition of January 19, 1981, advised that the petitioner's tax liabilities could now be settled since Empire had been successfully rehabilitated. Empire proposed to pay the basic tax liability owed and due as of

March 15, 1977, in the sum of \$145,390.00, plus interest to September 7, 1977, when Empire was placed into rehabilitation by court order.<sup>1</sup>

7. The remaining interest assessed (approximately \$35,000.00) covering the period of rehabilitation (September 7, 1977 through October 20, 1980) has not been paid. Empire received a memorandum dated March 27, 1980, from a staff member of the office of the Superintendent of Insurance which stated, in relevant part, that "(i)f the rehabilitation if (sic) terminated and the company goes back into business, interest is payable from the termination date and not for the rehabilitation period." Empire asserts this memorandum is dispositive on the issue and should be honored by the State Tax Commission.

8. The imposition of additional charges totalling \$56,702.10 for late payment of taxes (civil penalties imposed under Section 1085(a)(2) of the Tax Law) is likewise challenged by petitioner. Empire seeks waiver of these additional charges because the court's order was responsible for taxes not having been paid at the time the return was filed (September 13, 1977).

9. Empire maintains that since payment of interest for the period of rehabilitation and the additional penalty charges have been waived with respect to its associated company, Allcity Insurance Company, for the very same period (Allcity had also been placed in rehabilitation by Justice Asch in the same proceedings), a similar result should obtain here.

10. Allcity's payment of tax plus interest only to the period when rehabilitation began was accepted as sufficient by the Audit Division in closing out Allcity's 1976 tax liability.

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<sup>1</sup> Empire has since paid the basic tax owed plus approximately \$10,000.00 interest accrued to the date it was placed in rehabilitation (September 7, 1977).

CONCLUSIONS OF LAW

A. That in view of Justice Asch's order which deferred payment of claims against Empire until further court order (see Finding of Fact "1"), the nonpayment of taxes when due was not due to wilful neglect but rather was due to reasonable cause within the meaning and intent of section 1085(a)(2) of the Tax Law. Accordingly, the additional charges of \$56,702.10 are cancelled.

B. That rehabilitation of an insurance company is not unlike a proceeding under Chapter XI of the Bankruptcy Act (arrangement proceedings; 11 USC §701 et seq.), wherein interest ceases to accrue on antecedent debts, including taxes, upon the filing of a petition for protection under Chapter XI. See Nicholas v. United States, 384 U.S. 678. Noting this, and in view of all the facts and circumstances presented in this matter, including petitioner's reliance, in good faith, upon the written representations made to petitioner by the Insurance Department (see Finding of Fact "7"), as well as the Court's order which effectively precluded petitioner from paying the tax and stopping the accumulation of interest during the period of rehabilitation (see Finding of Fact "8"), the interest accrued against petitioner during its period of rehabilitation is cancelled. (cf. Matter of Empire State Surety Co., 125 Misc. 806; People v. Metropolitan Surety Co., 158 App. Div. 647).<sup>2</sup>

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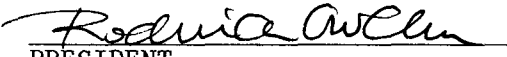
<sup>2</sup> It is apparant to this Commission that imposition of interest, in this case, would cause two state agencies to operate at cross purposes and, furthermore, could serve to undermine or destroy the rehabilitation of petitioner as accomplished over a three year period by the Insurance Department.

C. That the petition of Empire Mutual Insurance Company is granted in all respects and the Notice and Demand dated November 28, 1980 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER